

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SYLVESTER STRONG, JR.,)	1:05-cv-00112-OWW-TAG HC
)	
Petitioner,)	ORDER DISCHARGING ORDER TO SHOW
)	CAUSE (Doc. 11)
v.)	
)	ORDER FOR RESPONDENT TO FILE
)	RESPONSE
A.P.KANE, Warden,)	
)	
Respondent.)	

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The instant petition was filed on December 13, 2004, in the United States District Court for the Northern District of California. (Doc. 1). The case was transferred to the Eastern District of California on December 30, 2004. Petitioner challenges his sentence of a maximum of eighteen years based on a conviction for second degree murder and assault with a deadly weapon on October 21, 1988. (Doc. 1, p. 2). The Petition raises two grounds for relief: (1) breach of the plea agreement; and (2) misrepresentation of the plea agreement. (Doc. 1, p. 5).

On December 27, 2005, the Court issued an Order to Show Cause requiring Petitioner to explain why his petition had not been filed outside the one-year statute of limitations contained in 28 U.S.C. § 2244(d)(1). (Doc. 11).

On January 12, 2006, Petitioner filed his response to the Order to Show Cause, in which he contended that the factual predicate for his claim of unlawful execution of his sentence had only been discovered in or about July 1, 2003, when prison officials explained to him why he had

not previously been released on parole for Petitioner's 1988 conviction. (Doc. 12, p. 6). Petitioner maintains that it was only at that point that he realized that the plea agreement that resulted in the 1988 conviction had been breached by Respondent. (Id.). Accordingly, Petitioner initiated a "round" of state habeas petitions on October 3, 2003. (Id. at p. 7). That "round" ended when the California Supreme Court denied his habeas petition on November 10, 2004. (Id.). Petitioner filed this federal petition on December 30, 2004. (Doc. 1).

DISCUSSION

Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it plainly appears from the face of the petition . . . that the petitioner is not entitled to relief." Rule 4 of the Rules Governing 2254 Cases; Hendricks v. Vasquez, 908 F.2d 490 (9th Cir. 1990). Otherwise, the Court will order Respondent to respond to the petition. Rule 5 of the Rules governing § 2254 Cases.

Here, the Court conducted the required preliminary review, which resulted in the issuance of the December 27, 2005 Order to Show Cause, which reflected the Court's concern about the one-year statute of limitations. Petitioner's response to the Order to Show Cause has, at least preliminarily, satisfied the Court's concern in that regard.

ORDER

Accordingly, the Order to Show Cause issued on December 27, 2005 (Doc. 11), is hereby DISCHARGED.

Furthermore, pursuant to Rule 4 of the Rules Governing Section 2254 Cases and Rule 16 of the Federal Rules of Civil Procedure,¹ the Court HEREBY ORDERS:

1. Respondent SHALL FILE a RESPONSE. A Response can be made by filing one of the following:

¹The Federal Rules of Civil Procedure are "applicable to habeas corpus proceedings to the extent that the practice in such proceedings are not set forth in the statutes of the United States and has heretofore conformed to the practice of civil actions." Fed.R.Civ.P. 81(a)(2). Rule 11 also provides "the Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to the petitions filed under these rules." Rule 11, Rules Governing Section 2254 Cases.

A. AN ANSWER addressing the merits of the Petition and due within **NINETY (90)** days of the *date of service* of this order. Rule 4, Rules Governing Section 2254 Cases; Cluchette v. Rushen, 770 F.2d 1469, 1473-1474 (9th Cir. 1985) (court has discretion to fix time for filing an Answer.).

- Respondent SHALL INCLUDE with the Answer any and all transcripts or other documents necessary for the resolution of the issues presented in the Petition. Rule 5 of the Rules Governing Section 2254 Cases.
- Any argument by Respondent that Petitioner has *procedurally defaulted* a claim(s) SHALL BE MADE in an ANSWER that also addresses the merits of the claims asserted. This is to enable the Court to determine whether Petitioner meets an exception to procedural default. See Paradis v. Arave, 130 F.3d 385, 396 (9th Cir. 1997) (Procedurally defaulted claims may be reviewed on the merits to serve the ends of justice); Jones v. Delo, 56 F.3d 878 (8th Cir. 1995) (the answer to the question that it is more likely than not that no reasonable juror fairly considering all the evidence, including the new evidence, would have found Petitioner guilty beyond a reasonable doubt necessarily requires a review of the merits).
- Petitioner’s TRAVERSE, if any, is due **THIRTY (30)** days from the date Respondent’s Answer is filed with the Court.

B. A MOTION TO DISMISS due within **SIXTY(60)** days of the *date of service* of this order based on the following grounds:²

²Rule 4 of the Rules Governing Section 2254 Cases provides that upon the court’s determination that summary dismissal is inappropriate, the “judge shall order the respondent to file an answer or *other pleading . . . or to take such other action as the judge deems appropriate.*” Rule 4, Rules Governing Section 2254 Cases (emphasis added); see, also, Advisory Committee Notes to Rule 4 and 5 of Rules Governing Section 2254 Cases (stating that a

- i. EXHAUSTION - 28 U.S.C. § 2254(b)(1). A Motion to Dismiss for Petitioner's failure to exhaust state court remedies SHALL INCLUDE copies of all the Petitioner's state court filings and dispositive rulings so as to allow the Court to examine the limitations issue. See Ford v. Hubbard, 305 F.3d 875 (9th Cir. 2002); Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003);
- ii. STATUTE OF LIMITATIONS - 28 U.S.C. § 2244(d)(1). A Motion to Dismiss the Petition as filed beyond the one year limitations period SHALL INCLUDE copies of all Petitioner's state court filings and dispositive rulings.
- iii. SECOND OR SUCCESSIVE Petitions - 28 U.S.C. § 2244(b). A Motion to Dismiss the Petition on the basis of § 2244(b) SHALL include a copy of the previously filed federal Petition and disposition thereof.

2. OPPOSITIONS to Motions to Dismiss SHALL be served and filed within EIGHTEEN (18) days, plus three days for mailing. All other Oppositions SHALL be served and filed within EIGHT (8) days, plus three days for mailing. REPLIES to Oppositions to Motions to Dismiss SHALL be served and filed within eight (8) days, plus three days for mailing. Replies to Oppositions to all other Motions SHALL be served and filed within eight (8) days, plus three days for mailing. If no opposition is filed, all motions are deemed submitted at the expiration of the opposition period.

3. Unless already submitted, both Respondent and Petitioner SHALL COMPLETE and RETURN to the Court along with the Response or Motion to Dismiss, a Consent form indicating whether the party consents or declines to consent to the

dismissal may obviate the need for filing an answer on the substantive merits of the petition and that the Attorney General may file a Motion to Dismiss for failure to exhaust.); also, White v. Lewis, 874 F.2d 599, 60203 (9th Cir.1989) (providing that Motions to Dismiss pursuant to Rule 4 are proper in a federal habeas proceeding.)

jurisdiction of a the United States Magistrate Judge pursuant to Title 28 U.S.C.
§ 636(c)(1).

4. RESPONDENT SHALL submit a Notice of Appearance as attorney of record
within **SIXTY (60)** days of the date of service of this order for purposes of service
of court orders. See, Local Rule 83-182(a), 5-135(c).

5. The Clerk of the Court is DIRECTED to SERVE a copy of this order along with a
copy of the PETITION and any exhibits/attachments, on the Attorney General or
his representative.

All motions shall be submitted on the record and briefs filed without oral argument unless
otherwise ordered by the Court. Local Rule 78-230(h). All provisions of Local Rule 11-110 are
applicable to this order.

IT IS SO ORDERED.

Dated: March 8, 2007
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/s/ Theresa A. Goldner
UNITED STATES MAGISTRATE JUDGE